

**SYED SHAHARUL MOHAMED NASIR & ANOR v.
PENTADBIR TANAH DAERAH KLANG & ANOR**

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[JUDICIAL REVIEW NO: BA-25-60-10-2018]
23 MARCH 2020

A

B

ADMINISTRATIVE LAW: *Judicial review – Mandamus – Application for – Seeking order of mandamus to compel District Land Administrator to register Forms 14A and 16A under National Land Code – District Land Administrator refused to register charges over land in favour of applicants on grounds that first applicant was not ‘Malay’ – Whether District Land Administrator estopped by its conduct from relying on s. 8(i) of Federated Malay States’ Malay Reservations Enactment (‘MRE’) to deny first applicant was ‘Malay’ – Whether first applicant a ‘Malay’ within meaning of ss. 2 and 8(i) of MRE – Whether s. 8(i) of MRE barred registration of charge in favour of bank – Whether court should exercise discretion to grant mandamus order pursuant to s. 44(1) of Specific Relief Act 1950 – Whether applicants entitled to monetary compensation and damages*

C

D

LAND LAW: *Charge – Registration of – Registration of charge over land – District Land Administrator refused to register charges in favour of applicants on grounds that first applicant was not ‘Malay’ – Applicants sought order of mandamus to compel District Land Administrator to register Forms 14A and 16A under National Land Code – Whether District Land Administrator estopped by its conduct from relying on s. 8(i) of Federated Malay States’ Malay Reservations Enactment (‘MRE’) to deny first applicant was ‘Malay’ – Whether first applicant ‘Malay’ within meaning of ss. 2 and 8(i) of MRE – Whether s. 8(i) of MRE barred registration of charge in favour of bank – Whether court should exercise discretion to grant mandamus order pursuant to s. 44(1) of Specific Relief Act 1950 – Whether applicants entitled to monetary compensation and damages*

E

F

The first applicant purchased a piece of land (‘land’) from two Malay co-proprietors (‘co-vendors’). A double storey shop office building was erected on the land, subject to Federated Malay States’ Malay Reservations Enactment (‘MRE’). The first applicant’s purchase of the land was financed by an Islamic financing facility granted by the second applicant Islamic bank (‘second applicant’) which required the first applicant to register a charge under the National Land Code (‘NLC’) over the land to secure the first applicant’s repayment of the facility. The applicants presented to the first respondent for registration under the NLC the following instruments of dealing (i) Form 14A to register the transfer of title to the land from the co-vendors to the first applicant and; (ii) Form 16A to register the charge over the land in favour of the second applicant. The first respondent refused

G

H

I

- A to register both Forms 14A and 16A on the grounds that the certificate of birth of the first applicant's father stated that the first applicant's father was an Indian; that the first applicant's certificate of birth stated that the first applicant's mother was an Indian Muslim; and that the Jabatan Pendaftaran Negara ('JPN') had sent a letter stating that the first applicant was an Indian Muslim. *Via* encl.1, the applicants applied for leave of court to seek the following relief, among others (i) an order of *mandamus* to compel the first respondent to register Forms 14A and 16A under the NLC; and (ii) the respondents to pay general and special damages to the applicants. Enclosure 1 was allowed, hence a substantive judicial review application (encl. 17) was filed by the applicants against the respondents. The issues that arose were (i) whether the first respondent was estopped by its conduct from relying on s. 8(i) of the MRE to deny that the first applicant was a 'Malay' in this case; (ii) whether the first applicant was a 'Malay' within the meaning of ss. 2 and 8(i) of the MRE; (iii) whether s. 8(i) of the MRE barred the registration of a charge in favour of the second applicant; (iv) whether the court should exercise its discretion to grant a *mandamus* order to compel the first respondent to register Forms 14A and 16A pursuant to s. 44(1) of the Specific Relief Act 1950 (SRA); and (v) whether the applicants were entitled to any monetary compensation and/or damages from the respondents.

E **Held (granting *mandamus* order):**

- (1) Section 8(i) of the MRE prohibits transfers of a Malay holding in favour of a person who is not a 'Malay'. Such a prohibition is fortified by s. 19(i) and (ii) of the MRE. If a Malay holding is transferred contrary to s. 8(i) of the MRE, the first respondent shall decide that Form 14A is not fit for registration pursuant to s. 301(c) of the NLC and shall reject Form 14A 'forthwith' under s. 298(1) of the NLC. The MRE falls within the meaning of the phrase 'any other written law' in s. 301(c) of the NLC. The first respondent therefore could not be estopped from enforcing a statutory prohibition as embodied in s. 8(i) of the MRE. (paras 12, 14 & 15)
- (2) The first applicant had the legal burden under s. 101(1) and (2) of the Evidence Act 1950 and evidential burden pursuant to s. 102 of the EA ('EA') to satisfy the court that the first applicant was a 'Malay'; under ss. 2 and 8 (i) of the MRE. To do so, the first applicant had to prove on a balance of probabilities the following three conditions pursuant to s. 2 of the MRE (i) the first applicant belonged to 'any Malayan race' ('first condition'); (ii) the first applicant 'habitually speaks the Malay language' ('second condition') and (iii) the first applicant professes the Muslim religion.' The first condition was satisfied because

I

the birth certificate stated that the first applicant's race was Malay. According to s. 33(1) of the Births and Deaths Registration Act 1957 ('BDRA'), the contents of the birth certificate constituted evidence that the first applicant belonged to the Malay race. There was no correction of the race of the first applicant and his father in the birth certificate in accordance with

s. 27(1), (2) and (3A) of the BDRA. By reason of s. 27(1), (2) and (3A) of the BDRA, JPN's letter could not correct or alter the race of the first applicant and his father in the birth certificate. Further, the first applicant habitually spoke Malay and was a Muslim. Hence, the fulfilment of the second and third conditions. The first respondent's decision in not registering Form 14A was illegal as the first respondent had failed to give effect to s. 33(1) of the BDRA regarding the weight to be attached to the race of the first applicant and his father as stated in the birth certificate and the first respondent had also wrongly relied on JPN's letter. (paras 20-24)

- (3) The second applicant did not fall within the phrase 'no Malay holding shall be ... charged ... to any person not being a Malay' in s. 8(i) of the MRE. This was because the second applicant was licensed by the Minister of Finance under s. 10(4) of the Islamic Financial Services Act 2013 ('IFSA') to carry on 'Islamic banking business' (defined in s. 2(1) of the IFSA). When s. 8(i) of the MRE was first introduced, there was no Islamic bank which could provide Islamic financing facility to be secured by way of charges over Malay holdings. Hence, s. 8(i) of the MRE could not have been intended by the law-maker of MRE to apply to the second applicant. Section 8(i) of the MRE should be construed in a purposive manner. Charges may be created over Malay holdings in favour of licensed financial institutions so as to enable Malay owners of Malay holdings to develop the Malay holdings for the benefit of the owners in particular the Malay community in general. If otherwise, Malay holdings may be left idle without any financing to develop and unlock the true value of Malay holdings. The first respondent's decision in not registering Form 16A was unlawful because the first respondent had misconstrued s. 8(i) of the MRE. (paras 27 & 29)

- (4) This court had no hesitation in exercising its discretion to grant a *mandamus* order to compel the first respondent to register Forms 14A and 16A under the NLC because (i) the first respondent held a 'public office' of a 'permanent' nature under the NLC; (ii) the *mandamus* order required the first respondent to do a 'specific act' namely the registration of Forms 14A and 16A under the NLC; (iii) the application for the *mandamus* order was made by the applicants whose proprietary rights in

- A the land and proposed NLC charge over the land would be ‘injured’ by the first respondent’s ‘forbearing’ of the specific act (refer to proviso s. 44(1) of the SRA; (iv) the doing of the specific act under the applicable law was ‘clearly incumbent’ on the first respondent in the first respondent’s public character; (v) the doing of the specific act was
- B ‘consonant to right and justice’ as required by s. 44(1)(c) of the SRA; (vi) as explained in s. 44(1)(d) of the SRA, the applicants had ‘no other specific and adequate legal remedy’; and (vii) the *mandamus* order will be complete within the meaning of proviso (e) to s. 44(1) of the SRA. (para 32)
- C (5) As the *mandamus* order had been granted, the applicants had not suffered any loss from the first respondent’s decision. If the applicants had claimed damages by way of an action against the respondents, the court in the action would not have ordered damages to be paid by the respondent to the applicants (O. 53 r. 5(1)(b) of the Rules of Court 2012). There was no basis for this court to award monetary compensation and/or damages in favour of the applicants against the respondents. (para 34)
- D

Case(s) referred to:

- E *Jambatan Merah Sdn Bhd (In Liquidation) v. Public Bank Bhd* [2016] 1 CLJ 811 HC (refd)
- Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321 FC (refd)
- Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 FC (refd)

Legislation referred to:

- F Births and Deaths Registration Act 1957, ss. 2(a), 27(1), (2), (3A), 33(1)
Evidence Act 1950, ss. 101(1), (2), 102
Federal Constitution, arts. 89(6), 160(2)
Islamic Financial Services Act 2013, ss. 2(1), 10(4)
National Land Code, ss. 4(2)(b), 298(1), 301(c)
Rules of Court 2012, O. 53 rr. 1(2), 2(3), 5(1)(b)
- G Specific Relief Act 1950, s. 44(1)(a), (b), (c), (d), (e)

For the applicants - Azhar Nur Abdul Manaf; M/s Zain Johnson & Assocs

For the respondents - Siti Fatimah Talib; Assistant State Legal Advisor, Selangor

Reported by Suhainah Wahiduddin

H **JUDGMENT**

(Court encl. no. 17 – substantive judicial review application)

Wong Kian Kheong J:

I **Background**

[1] The first applicant (first applicant) purchased a piece of land held under title H.S.(M) 52208, PT No. 141946 (land) from two Malay co-proprietors (co-vendors) at a price of RM700,000.

[2] A double-storey shop office building has been erected on the land which is subject to Federated Malay States' Malay Reservations Enactment (MRE). A

[3] The first applicant's purchase of the land is financed by an Islamic financing facility (facility) granted by the second applicant Islamic bank (second applicant). The facility requires the first applicant to register a charge under the National Land Code (NLC) over the land to secure the first applicant's repayment of the facility. B

[4] The solicitors for the first and second applicants (collectively referred as the "applicants") presented to the first respondent (first respondent) for registration under NLC the following instruments of dealing: C

(i) "Form 14A" to register the transfer of title to the land from the co-vendors to the first applicant (Form 14A); and

(ii) "Form 16A" to register the charge over the land in favour of the second applicant (Form 16A). D

[5] The first respondent refused to register Forms 14A and 16A (first respondent's decision) on the following grounds:

(i) the "certificate of birth" of the first applicant's father (birth certificate (first applicant's father)) states that the first applicant's father is an Indian; E

(ii) the first applicant's certificate of birth (birth certificate (first applicant)) states that the first applicant's mother is an Indian Muslim; and

(iii) on two written enquiries dated 8 August 2018 and 14 August 2018 by the first respondent, "Jabatan Pendaftaran Negara Malaysia" (JPN) has sent a letter dated 22 August 2018 (JPN's letter) which states that the first applicant is an Indian Muslim. F

This Application

[6] In court enclosure no. 1 (encl. 1), the applicants applied for leave of court to seek the following reliefs, among others: G

(i) an order of *mandamus* to compel the first respondent to register Forms 14A and 16A under NLC; and

(ii) the above-named respondents (respondents) shall pay general and special damages to the applicants which shall be assessed by this court. H

[7] Enclosure 1 was allowed by Vazeer Alam bin Mydin Meera J (as he then was). Hence, a substantive judicial review application (encl. 17) has been filed by the applicants against the respondents for the same relief as stated in the above para. 6. I

A Issues

[8] Enclosure 17 raises the following questions to be decided by this court:

- B** (i) is the first respondent estopped by its conduct from relying on s. 8(i) MRE to deny that the first applicant is a “Malay” in this case?;
- (ii) whether the definition of “Malay” in:
- C** (a) s. 2 MRE;
- (b) article 89(6) of the Federal Constitution (FC); or
- (c) article 160(2) FC
- (1) applies to the term “Malay” in s. 8(i) MRE;
- (iii) in view of:
- D** (a) the birth certificate (first applicant’s father) (which states that the first applicant’s father is an Indian);
- (b) the birth certificate (first applicant) (which states that the first applicant’s mother is an Indian Muslim); and
- E** (c) JPN’s letter (which states that the first applicant is an Indian Muslim)
- (1) is the first applicant a “Malay” within the meaning of ss. 2 and 8(i) MRE? This question discusses the following statutory provisions:
- F** (i) the effect of s. 33(1) of the Births and Deaths Registration Act 1957 (BDRA) regarding the contents of the birth certificate (first applicant) that the first applicant and his father are Malays; and
- (ii) there is no correction of the contents of the birth certificate
- G** (first applicant) pursuant to s. 27(1), (2) and (3A) BDRA;
- (iv) does s. 8(i) MRE bar the registration of a charge in favour of the second applicant?;
- (v) whether the court should exercise its discretion to grant a *mandamus* order to compel the first respondent to register Forms 14A and 16A pursuant to s. 44(1) of the Specific Relief Act 1950 (SRA); and
- H** (vi) are the applicants entitled to any monetary compensation and/or damages from the respondents?

I

The aforesaid second to fourth questions are novel.

A

Overriding Effect Of MRE

[9] By virtue of s. 4(2)(b) NLC, NLC is subject to MRE. I reproduce below s. 4(2)(b) NLC:

Savings.

B

4(1) ...

(2) Except in so far as it is expressly provided to the contrary, nothing in [NLC] shall affect the provisions of:

...

C

(b) any law for the time being in force relating to Malay reservations or Malay holdings;

...

and, in the absence of express provision to the contrary, if any provision of [NLC] is inconsistent with any provision of any such law, the latter provision shall prevail, and the former provision shall, to the extent of the inconsistency, be void.

D

(emphasis added).

[10] The overriding effect of MRE is amplified in s. 21 MRE which provides as follows:

E

Enactment to prevail against provisions of other laws.

21 If in any case any conflict shall arise between the provisions of this Enactment and the provisions of the Land Code, or of the Civil Procedure Code, or of the Powers of Attorney Enactment, the provisions of this Enactment shall prevail.

(emphasis added).

F

Is First Respondent Estopped From Enforcing s. 8(i) MRE?

[11] Section 8 MRE states as follows:

Restriction as to transfer, charges and leases.

8(i) Subject to the provisions of sub-section (ii) and of sections 16 and 17 **no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, charge or lease in contravention of this section shall be capable of registration in any Land Office or Registry of Titles.**

G

(ii) If any land included in a Malay Reservation is sub-divided and sub-divisional titles registered therefor and one or more of the proprietors of such land are Malays and one or more of the proprietors of such land are persons who are not Malays and there are simultaneously presented to the proper registering authority cross-transfers of such sub-divisional titles, such cross-transfers may notwithstanding anything contained in sub-section (i) be registered by such proper registering authority.

H

(emphasis added).

I

- A [12] The applicants' learned counsel has submitted that the conduct of the first respondent in this case estops the first respondent from denying that the first applicant is a "Malay". I am not able to accept this submission because the first respondent cannot be estopped from enforcing a statutory prohibition as embodied in s. 8(i) MRE. It is decided in *Jambatan Merah Sdn Bhd (In liquidation) v. Public Bank Bhd* [2016] 1 CLJ 811, at [78], as follows:

B [78] In respect of the Defendant's purported right to exercise remedy as a chargee under s. 271(1)(a) NLC, *it is trite law that there can be no application of the issue estoppel doctrine against the operation of a statutory provision* (in this case, the application of s. 270(1)(a) NLC). *I cite the following cases:*

- C (a) in *Hotel Ambassador (M) Sdn Bhd v. Seapower (M) Sdn Bhd* [1991] 1 MLJ 404, at 407, Hashim Yeop Sani CJ (Malaya) *held in the Supreme Court as follows:*

D *On the question of issue estoppel we agree with the learned judge that on the facts of this case the appellants cannot invoke the doctrine of issue estoppel. There can be no estoppel as against statutory provisions.* (emphasis added);

- (b) *Thomas CJ decided as follows in the Court of Appeal of the Federated Malays States in Puran Singh v Kehar Singh* [1939] 1 MLJ 71, at 75:

E The main question argued at the appeal was that the learned trial Judge having held that the registration of Kehar Singh as proprietor of certain lands had been obtained by means of an insufficient or void instrument, viz., an invalid power of attorney, and that it was in consequence void under section 42(iii) of the Land Code, he was wrong in holding that the plaintiff was estopped by his conduct from objecting to the registration. In support of this contention he cited *Borrow's case* [1880] 14 Ch D 432 in which it is stated by Bacon, VC, in the course of his judgment that:

G *the doctrine of estoppel cannot be applied to an Act of Parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament.*

H *This view is followed in the case of Abdul Aziz v. Kanthen Mallik 38 ILR Cal 512 515 in which at page 515 a long list of authorities has been set out. The Court there decided that it was not prepared to accede to the argument that the principle of estoppel overrides the provisions of either section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act. ...*

I *So far as this is an argument on the question of estoppel it cannot in my opinion succeed, since it is only another way of saying that acts of the parties inter se can amount to an estoppel in respect of an Enactment.*

(emphasis added); and

- (c) in *Re Salvage Engineers Ltd* [1962] 1 28 MLJ 438, at 440, Ong J (as he then was) held in the High Court:

There can be no estoppel against the operation of a statute.

(emphasis added).

Application Of s. 8(i) MRE

[13] The land is “Malay holding” as understood in s. 2 MRE as follows:

“Malay holding” includes

- (a) **any registered interest of a Malay as proprietor or co-proprietor in any alienated land included in a Malay Reservation duly declared and gazetted under the provisions of [MRE]:**

Provided that no such interest shall be deemed to be a Malay holding until there shall have been registered against the register document of title for such land a requisition in the Form A in the First Schedule as provided in section 6.

- (b) any registered interest of a Malay as proprietor or co-proprietor in any alienated land included in a Malay Reservation duly declared and gazetted under the provisions of the Malay Reservations Enactment, 1913.

[14] Section 8(i) MRE (no memorandum of transfer ... in contravention of this section shall be capable of registration in any land office or Registry of Titles) prohibits transfers of a Malay holding in favour of a person who is not a “Malay”. Such a prohibition is fortified by s. 19(i) and (ii) MRE which provide as follows:

Dealings contrary to Enactment void.

19(i) **All dealings or disposals whatsoever and all attempts to deal in or dispose of any Malay holding contrary to the provisions of [MRE] shall be null and void** and no rent paid in pursuance of any such dealing disposal or attempts shall be recoverable in any Court.

(ii) **No action for breach of contract shall lie in respect of any dealing in or disposal of or any attempt to deal in or dispose of any Malay holding contrary to the provisions of [MRE].** (emphasis added).

[15] If a Malay holding is transferred contrary to s. 8(i) MRE, the first respondent shall decide that Form 14A is not fit for registration pursuant to s. 301(c) NLC and shall reject Form 14A “forthwith” under s. 298(1) NLC. I reproduce below the relevant parts of ss. 298(1) and 301(c) NLC:

A **Rejection** or suspension for **unfitness**, or absence of certain documents.
298(1) **Where any instrument is not fit for registration, the registrar shall reject it forthwith** unless the unfitness consists solely of some formal defect or clerical error.

B **When an instrument is fit for registration.**
301 **An instrument shall be fit for registration under this Part if, but only if, the following conditions are satisfied:**

...
C (c) **that the dealing which it effects is not contrary to any prohibition or limitation imposed by this Act or any other written law for the time being in force, or to any restriction in interest to which the land in question is for the time being subject; ...** (emphasis added).

It is clear that MRE falls within the meaning of the phrase “any other written law” in s. 301(c) NLC.

D **Which Definition Of “Malay” Is Applicable?**

[16] Regarding the meaning of “Malay” in s. 8(i) MRE, learned counsel for the applicants and respondents have referred to the term “Malay” in the following provisions:

E (i) s. 2 MRE provides a definition of “Malay” as follows:

Interpretation.

2 In this Enactment unless the context otherwise requires:

...
F **“Malay” means** “a person belonging to any Malayan race who habitually speaks the Malay language or any Malayan language and professes the Moslem religion”;

(ii) Article 89(6) FC defines a “Malay” for the purpose of art. 89 FC.
Article 89 FC provides as follows:

G **Malay reservations**

89(1) Any land in a State which immediately before Merdeka Day was a Malay reservation in accordance with the existing law may continue as a Malay reservation in accordance with that law until otherwise provided by an Enactment of the Legislature of that State, being an Enactment:

H (a) passed by a majority of the total number of members of the Legislative Assembly and by the votes of not less than two-thirds of the members present and voting; and

I

- (b) approved by resolution of each House of Parliament passed by a majority of the total number of members of that House and by the votes of not less than two-thirds of the members voting. A
- (1A) Any law made under Clause (1) providing for the forfeiture or reversal to the State Authority, or for the deprivation, of the ownership of any Malay reservation, or of any right or interest therein, on account of any person, or any corporation, company or other body (whether corporate or unincorporate) holding the same ceasing to be qualified or competent under the relevant law relating to Malay reservations to hold the same, shall not be invalid on the ground of inconsistency with Article 13. B
- (2) Any land in a State which is not for the time being a Malay reservation in accordance with the existing law and has not been developed or cultivated may be declared as a Malay reservation in accordance with that law: C
- Provided that:
- (a) where any land in a State is declared a Malay reservation under this Clause, an equal area of land in that State which has not been developed or cultivated shall be made available for general alienation; and D
- (b) the total area of land in a State for the time being declared as a Malay reservation under this Clause shall not at any time exceed the total area of land in that State which has been made available for general alienation in pursuance of paragraph (a). E
- (3) Subject to Clause (4), that Government of any State may, in accordance with the existing law, declare as a Malay reservation - F
- (a) any land acquired by that Government by agreement for that purpose;
- (b) on the application of the proprietor, and with the consent of every person having a right or interest therein, any other land, and shall, in accordance with the existing law, immediately declare as a Malay reservation, in a case where any land ceases to be a Malay reservation, any other land of a similar character and of an area not exceeding the area of that land. G
- (4) Nothing in this Article shall authorise the declaration as a Malay reservation of any land which at the time of the declaration is owned or occupied by a person who is not a Malay or in or over which such a person has then any right or interest. H
- (5) Without prejudice to Clause (3), the Government of any State may, in accordance with law, acquire land for the settlement of Malays or other communities, and establish trusts for that purpose. I

- A (6) **In this Article** “Malay reservation” means land reserved for alienation to Malays or to natives of the State in which it lies; and **“Malay” includes any person who, under the law of the State in which he is resident, is treated as a Malay for the purposes of the reservation of land.**
- B (7) Subject to Article 161A, this Article shall have effect notwithstanding any other provision of this Constitution; but (without prejudice to any such other provision) no land shall be retained or declared as a Malay reservation except as provided by this Article and Article 90.
- C (8) The provisions of this Article shall apply to the Federal Territories of Kuala Lumpur and Putrajaya in the like manner that they apply to a State, save that Clause (1) in its application to the Federal Territories of Kuala Lumpur and Putrajaya shall be modified to read that any land in the Federal Territory of Kuala Lumpur or the Federal Territory of Putrajaya which immediately before Merdeka Day was a Malay reservation in accordance with the existing law may continue as a Malay reservation in accordance with that law until otherwise provided by an Act of Parliament passed by a majority of the total number of members of each House of Parliament and by the votes of not less than two-thirds of the members present and voting in each House.
- E (emphasis added);
- (iii) Article 160(2) FC states as follows, among others:
- Article 160(2) *In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say:*
- F ...
- “Malay” means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and:
- G (a) *was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or*
- (b) *is the issue of such a person;*
- (emphasis added); and
- H (iv) Part 1 of the Interpretation Acts 1948 and 1967 (IA) applies to all written law as stipulated in s. 2(1)(a) to (e) IA. Part 1 of IA contains s. 3 which provides for definitions. According to s. 3 IA, “Malay” has the meaning assigned by art. 160(2) FC.
- I

[17] I am of the view that the word “Malay” in s. 8(i) MRE should have the meaning as defined in s. 2 MRE. This is because s. 2 MRE has expressly stated that the definitions provided therein shall apply all the provisions in MRE (except where the context of the provision in MRE otherwise requires). I am not able to apply the following definitions of “Malay” in the construction of s. 8(i) MRE:

- (i) as expressly stated in art. 89(6) FC, the definition of “Malay” in art. 89(6) FC only applies in the interpretation of art. 89 FC; and
- (ii) the definition of “Malay” in art. 160(2) FC applies in the construction of the following provisions (unless the context of the provision otherwise requires):
 - (a) all provisions in the FC except for art. 89 FC (the definition of “Malay” in art. 89(6) FC is applicable); and
 - (b) all written law stipulated in s. 2(1)(a) to (e) IA.

Is First Applicant A “Malay” Under s. 2 MRE?

[18] In this case, ss. 8(ii), 16 (sales by encumbrancers) and 17 (land may be charged or leased to Government and charged to certain co-operative societies) MRE do not apply.

[19] It is clear that if the first applicant is not a “Malay” under s. 2 MRE:

- (i) Form 14A is not fit for registration under s. 301(c) NLC read with ss. 8(i) and 19(i) MRE; and
- (ii) the first respondent cannot register Form 14A. Instead, the first respondent shall reject forthwith Form 14A pursuant to s. 298(1) NLC.

[20] Firstly, the first applicant has the:

- (i) legal burden under s. 101(1) and (2) of the Evidence Act 1950 (EA); and
- (ii) evidential burden pursuant to s. 102 EA
 - (a) to satisfy the court that the first applicant is a “Malay” under ss. 2 and 8(i) MRE. To do so, the first applicant has to prove on a balance of probabilities the following three conditions pursuant to s. 2 MRE (three conditions):
 - (1) the first applicant belongs to “any Malayan race” (first condition);
 - (2) the first applicant “habitually speaks the Malay language” (second condition); and
 - (3) the first applicant “professes the Moslem religion” (third condition).

- A [21] The first condition is satisfied because the birth certificate (first applicant) states the first applicant's "race" (keturunan) is Malay. The birth certificate (first applicant) also states that the first applicant's father is a Malay. According to s. 33(1) BDRA, the contents of the birth certificate (first applicant) constitute evidence that the first applicant belongs to the "Malay" race. Section 33(1) BDRA states as follows:
- B

Entry in register as evidence of birth, death or presumed death.

- C 33(1) *Subject to the provisions of this section an entry or a Certificate of Birth, Certificate of Death or Certificate of Presumed Death relating thereto purporting to have been duly certified under subsection 32(2) shall be received without further or other proof as evidence of such facts and particulars relating to such birth, death or presumed death as are or were at the time of the making of such entry required by law to be set forth in such entry or certificate.*
- (emphasis added).

- D If there is a "clerical error" regarding the first applicant's race in the birth certificate (first applicant), in accordance with s. 27(2) BDRA, the "Superintendent-Registrar of Births and Deaths" (please see the interpretation provision in s. 2 BDRA) should have corrected such a clerical error in a manner as directed by the "Registrar-General of Births and Deaths" (Registrar-General) (as defined in s. 2 BDRA). Nor was there a correction of the first applicant's race in the birth certificate (first applicant)
- E by the Registrar-General pursuant to s. 27(3A) BDRA. It is noted that by virtue of s. 27(1) BDRA, there cannot be any alteration of the "register of births and deaths" (defined in s. 2(a) BDRA) except as authorised by BDRA.

Section 27 BDRA provides as follows:

- F *Correction of errors and alteration in register.*
- 27(1) *No alteration in any register shall be made except as authorised by this Act.*
- (2) *Any clerical error which may from time to time be discovered in any register may be corrected by the Superintendent-Registrar, in such manner as the Registrar-General shall direct.*
- G (3) *Any error of fact or substance in any register may be corrected by the Registrar-General upon payment of the prescribed fee and upon production by the person requiring such error to be corrected of a statutory declaration setting forth the nature of the error and the true facts of the case, and made by two persons required by this Act to give information concerning the birth, still-birth or death with reference to which the error has been made, or in default of such persons then by two credible persons having knowledge to the satisfaction of the Registrar-General of the truth of the case; and the Registrar-General may if he is satisfied of the facts stated in the statutory declaration cause such entry to be certified and the day and the month and the year when such correction is made to be added thereto.*
- H

I

(3A) *Where the Registrar-General, the Superintendent-Registrar or the Registrar is satisfied that from an inquiry held under section 37B an error of fact or substance in any register exists, the error of fact or substance may be corrected by the Registrar-General.*

A

(4) Where an error of fact or substance occurs in the information forwarded by a Coroner or Magistrate under section 24 the Coroner or Magistrate, if satisfied that such error exists, may certify under his hand to the appropriate Superintendent-Registrar the nature of the error and the true facts of the case as ascertained by him, and the error may thereupon be corrected by such Superintendent-Registrar.

B

(emphasis added).

[22] I decided that the first respondent cannot rely on:

C

- (i) the birth certificate (first applicant's father) which states that the first applicant's father is an Indian;
- (ii) the birth certificate (first applicant) which states that the first applicant's mother is an Indian Muslim; and
- (iii) JPN's letter which states that the first applicant is an Indian Muslim.

D

The above decision is based on the following reasons:

- (a) by reason of s. 33(1) BDRA, weight should be given to the first applicant's race as stated in the birth certificate (first applicant) – please see the above para. [21]. The birth certificate (first applicant) also states that the first applicant's father is a Malay;
- (b) there was no correction of the race of the first applicant and his father in the birth certificate (first applicant) in accordance with s. 27(1), (2) and (3A) BDRA; and
- (c) by reason of s. 27(1), (2) and (3A) BDRA, JPN's letter cannot correct or alter the race of the first applicant and his father in the birth certificate (first applicant).

E

F

[23] It is not disputed in this case that the first applicant habitually speaks Malay and is a Muslim. Hence, the fulfilment of the second and third conditions.

G

[24] The court may review a decision of a public officer if, among others, the decision involves an illegality – please see the judgment of Raus Sharif FCJ (as he then was) in the Federal Court case of *Ranjit Kaur S. Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629, at [15]. In this case, the first respondent's decision (in not registering Form 14A) is illegal due to the following reasons:

H

I

- A (i) the first respondent has failed to give effect to s. 33(1) BDRA regarding the weight to be attached to the race of the first applicant and his father as stated in the birth certificate (first applicant); and
- (ii) in view of s. 27(1), (2) and (3A) BDRA, the first respondent has wrongly relied on JPN's letter.

B **Does Section 8(i) MRE Bar Registration Of Charge In Favour Of Second Applicant?**

[25] Section 2 MRE has provided the following definition when a company may be deemed to be a "Malay" (Malay Company):

- C *For the purposes of [MRE] a company registered under Companies Enactment [Cap. 58] shall if and so long as every member thereof is a Malay and the transfer of shares therein is restricted by the Articles of Association thereof to Malays be deemed to be a Malay, and any registered interest in land of which such a company is proprietor shall be deemed to be a Malay holding. (emphasis added).*

- D [26] The definition of Malay company in s. 2 MRE does not apply to the second applicant in this case.

[27] I am of the view that s. 8(i) MRE does not apply to the second applicant because:

- E (i) the second applicant does not fall within the phrase "no Malay holding shall be ... charged ... to any person not being a Malay" in s. 8(i) MRE. This is because the second applicant is licensed by the Minister of Finance under s. 10(4) of the Islamic Financial Services Act 2013 (IFSA) to carry on "Islamic banking business" (defined in s. 2(1) IFSA).
- F When s. 8(i) MRE was first introduced, there was no Islamic bank which could provide Islamic financing facility to be secured by way of charges over Malay holdings. Hence, s. 8(i) MRE could not have been intended by the law-maker of MRE to apply to the second applicant; and
- G (ii) s. 8(i) MRE should be construed in a purposive manner. Charges may be created over Malay holdings in favour of licensed financial institutions so as to enable Malay owners of Malay holdings (owners) to develop the Malay holdings for the benefit of the owners in particular and the Malay community in general. If otherwise, Malay holdings may be left idle without any financing to develop and unlock the true value of Malay holdings.

- H [28] As explained in the above para. [27], although charges may be registered under NLC over Malay holdings in favour of licensed financial institutions, if the charges are enforced by way of orders of sale by way of public auction, in accordance with s. 8(i) MRE, the Malay holdings can only
- I be sold and transferred to the following persons:

- (i) individuals who are Malays as understood in s. 2 MRE – please see the three conditions as explained in the above sub-paras. 20(1) to (3); and A
- (ii) Malay companies as defined in s. 2 MRE.

[29] The first respondent's decision (in not registering Form 16A) is unlawful because the first respondent has misconstrued s. 8(i) MRE – please see the above para. [27]. B

Whether Court Should Grant A *Mandamus* Order In This Case?

[30] As the first respondent's decision is illegal for reasons explained in the above paras. [21] to [24], [27] and [29], the court may exercise its discretion to grant an order of *mandamus* in this case. C

[31] The court can only give a *mandamus* order if all the conditions laid down in s. 44(1) SRA (conditions (*mandamus* order)) are fulfilled – please see the judgment of Abdul Hamid Mohamad CJ in the Federal Court case of *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 641, at [13]. Section 44(1) SRA provides as follows: D

Power to order public servants and others to do certain specific acts

44(1)A Judge may make an order requiring any specific act to be done or forborne, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court: E

Provided that:

- (a) **an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;** F
 - (b) **such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;**
 - (c) **in the opinion of the Judge the doing or forbearing is consonant to right and justice;** G
 - (d) **the applicant has no other specific and adequate legal remedy; and**
 - (e) **the remedy given by the order applied for will be complete.** H
- (emphasis added).

The mandatory effect of the conditions (*mandamus* order) in s. 44(1) SRA is reiterated by O. 53 r. 1(2) of the Rules of Court 2012 (RC). Order 53 r. 1(2) RC provides as follows: I

O 53 r 1(2) This Order is subject to the provisions of Chapter VIII of Part 2 of (SRA). I

(emphasis added).

A Chapter VIII of Part 2 of SRA contains, among others, s. 44 SRA.

[32] I have no hesitation to exercise my discretion to grant a *mandamus* order to compel the first respondent to register Forms 14A and 16A under the NLC (*mandamus* order). This is because all the conditions (*mandamus* order) have been fulfilled as follows:

- B (i) the first respondent holds a “public office” of a “permanent” nature under the NLC;
- (ii) the *mandamus* order requires the first respondent to do a “specific act”, namely the registration of Forms 14A and 16A under the NLC (Specific Act);
- C (iii) the application for the *mandamus* order is made by the applicants whose proprietary rights in the land and proposed NLC charge over the land would be “injured” by the first respondent’s “forbearing” of the specific act – please refer to proviso (a) to s. 44(1) SRA;
- D (iv) the doing of the specific act under the applicable law is “clearly incumbent” on the first respondent in the first respondent’s public character – please refer to proviso (b) to s. 44(1) SRA;
- (v) the doing of the specific act is “consonant to right and justice” as required by proviso (c) to s. 44(1) SRA;
- E (vi) as explained in proviso (d) to s. 44(1) SRA, the applicants have “no other specific and adequate legal remedy”; and
- (vii) the *mandamus* order “will be complete” within the meaning of proviso (e) to s. 44(1) SRA.
- F

Can Applicants Claim Monetary Compensation And/Or Damages From Respondents?

[33] In a judicial review application, the court may grant monetary compensation and/or damages. This is clear from O. 53 rr. 2(3) and 5(1) RC which state as follows:

G

O. 53 r. 2(3) **Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation:**

H Provided that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1956 [Act 359] and section 54 [SRA].

I

Damages

A

O. 53 r. 5(1) On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if:

(a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates; and

B

(b) the Court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.

(2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading. (emphasis added).

C

[34] There is no basis for this court to award monetary compensation and/or damages in favour of the applicants against the respondents because:

(i) as the *mandamus* order has been granted in this case, the applicants have not suffered any loss from the first respondent's decision; and

D

(ii) if the applicants have claimed damages by way of an action against the respondents (action), the court in the action would not have ordered damages to be paid by the respondents to the applicants – please refer to O. 53 r. 5(1)(b) RC.

E

Court's Decision

[35] Based on the above evidence and reasons, encl. 17 is allowed to the following extent only:

(i) the *mandamus* order is granted to compel the first respondent to register Forms 14A and 16A under NLC by or before 5pm, 21 February 2020; and

F

(ii) costs of encl. 17 shall be paid by the respondents to the applicants.

[36] I end this judgment with the hope that MRE can be updated (if not reformed) so as to enable financing of the development of Malay holdings in the interest of:

G

(i) their Malay owners in particular; and

(ii) the Malay community and the country as a whole.

H

I